

January 25, 2007

Civil Division-Kent County (739-7641)

Mr. John R. Collier
301 Coulter Street
Milton, DE 19968

Ms. Marion L. Jones
411 Behringer Avenue
Milton, DE 19968

**Re: Freedom of Information Act Complaint
Against Town of Milton**

Dear Mr. Collier and Ms. Jones:

On December 1, 2006, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), against the Town of Milton ("the Town") alleging that the Mayor and members of the Town Council violated the open meeting requirements of FOIA by meeting in "small groups of three or less (thus falling short of a quorum) . . . on at least three separate occasions with each of the two companies competing for [a] waste water treatment contract: Artesian and Tidewater." ¹

On the day of the last subquorum meeting (November 3, 2006), the Town posted public notice of a special meeting for November 13, 2006. You provided us with a copy of the notice and agenda for that special meeting which listed as the only matter for discussion, "Wastewater."

According to your complaint, at the November 13, 2006 special meeting "each company

¹ You also allege that the Town did not follow the procedures required in the Town Charter for scheduling a special meeting on November 13, 2006 to discuss wastewater treatment. That issue of municipal law is outside our jurisdiction under FOIA.

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[Artesian and Tidewater] was granted approximately 15 minutes to give a brief synopsis of their plans and address questions from the audience and Council. . . . After voting to privatize waste water services, the Mayor and Council further voted to enter into contract negotiations with Tidewater."

By letter dated December 5, 2006, our Office asked the Town to respond to your complaint in writing by December 15, 2006. Our Office granted the Town's request for a brief extension of time until December 22, 2006 to accommodate the trial and vacation schedule of the Town Solicitor.

Our Office received the Town's response by facsimile on December 22, 2006. On January 9, 2007, our Office requested additional information from the Town which we received on January 12 and 16, 2007.

According to the Town, prior to the public meeting on November 13, 2006, "[e]ach company [Artesian and Tidewater] was afforded an opportunity to present to all members of town council in one of 3 sessions, none of which had a quorum present." The Town acknowledges it did not give the public notice of these meetings or post agendas or prepare minutes. The Town contends, however, that these meetings were "permitted presentation meetings allowed by Delaware Law" (citing 71 *Del. Laws* ch. 4) to determine if "the selected contractor could comply with the professional services needed by and in the best interest of the Town of Milton to negotiate a contract on wastewater management." ²

² In 1997, the legislature amended the State Procurement Code, 29 *Del. C.* Ch. 69, to limit the application of the Code to municipalities like the Town. *See* 71 *Del. Laws* ch.4, s.1 (defined agencies covered by the Code "shall not include any local government unit or agency receiving only grants-in-aid appropriations from the State"). The State Procurement Code does not exempt the Town from the open meeting requirements of FOIA so the Town's reliance on the Code is misplaced.

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." *Id.* §10002(e).

FOIA authorizes a public body to meet in executive session to discuss "the content of documents, excluded from the definition of 'public record' in §10002 of this title where such discussion may disclose the contents of such documents." *Id.* §10004(b)(6).

FOIA exempts from the definition of a "public record" any "[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." *Id.* §10002(g)(2).

FOIA requires that the notice of a meeting of a public body "shall include the agenda." *Id.* §10004(e)(2). FOIA defines an "agenda" as "a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific grounds therefor" 29 *Del. C.* §10002(a).

FOIA provides that "the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body's meeting." *Id.* §10004(e)(2).

LEGAL ANALYSIS

A. Subquorum Meetings

According to the Town's website, the Town Council is comprised of the Mayor (Don Post) and six council members (Noble Prettyman, Ronda Melson, Gene Dvornick, Leah Betts, John Frey, and Ed Harris). Four members constitute a quorum.

The Town acknowledges that the Mayor and members of the Town Council met in private three times with Artesian and three times with Tidewater without notice to the public to discuss privatizing the Town's wastewater treatment system. The Town contends these meetings were not subject to the open meeting requirements of FOIA because no more than three members of the Council (less than a quorum) attended any one of the meetings.

"Our Office has previously determined that FOIA applies to serial discussions which allow members of a public body 'to receive and comment on other members' opinions and thoughts, and reach a consensus on action to take.'" *Att'y Gen. Op.* 06-IB16 (Aug. 7, 2006) (quoting *Att'y Gen. Op.* 03-IB11 (May 19, 2005)). "It is the nature, timing and substance of the communications which together may turn serial meetings into a constructive quorum." *Att'y Gen. Op.* 06-IB16.

There were three private meetings between members of the Council and Tidewater held at the Town Hall: October 5, 2006 (attended by Councilwoman Betts, Councilman Harris, and Councilman Frey); October 16, 2006 (attended by Councilman Dvornak, Councilman Noble Prettyman, and Councilwoman Melson); and October 27, 2006 (attended by Mayor Don Post).

There were three private meetings between Artesian and members of the Town Council held at the Town Hall: November 1, 2006 (attended by Councilman Frey, Mayor Post, and Councilman Dvornick); November 2, 2006 (attended by Councilwoman Melson); and November 3, 2006 (attended by Councilwoman Betts, Councilman Prettyman, and Councilman Harris).

We believe that these serial meetings between Council members and Tidewater and Artesian amounted to a constructive quorum of the Council. Over the course of those meetings, all seven members of the Town Council heard the same power point presentation by Tidewater and Artesian at the Town Hall. Given the nature, timing, and substance of these serial meetings, we believe that a constructive quorum of the Council met to discuss an important matter of public business – first with Tidewater, and then with Artesian – without notice to the public, without posting and agenda, and without preparing minutes as required by FOIA.

"Without the benefit of minutes, it is difficult to know one way or the other what the Council discussed with representatives of [Tidewater and Artesian]" at the private meetings in October and November 2006. *Att'y Gen. Op.* 02-IB07 (Mar. 22, 2002). In similar situations, our Office has looked to see if "any action was taken in the public meeting without sufficient discussion which might lead to an inference that such action was discussed prior to the meeting." *Att'y Gen. Op.* 95-IB35 (Nov. 2, 1995).

In *Att'y Gen. Op.* 02-IB07, the County Council met on December 11, 2001 with representatives from a private land trust over lunch at a local country club. The Council did not prepare minutes of that gathering because it claimed the luncheon was merely a social function to get to know the directors of the land trust and not subject to the open meeting law. Our Office drew the inference that at the luncheon the "Council discussed entering into a partnership with the Land Trust. This inference is reinforced by the minutes of the Council's December 18, 2001 meeting, where the Council decided to endorse a partnership [with a private land trust] and enact the necessary ordinance."

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The record supports the inference that the Town Council reached a consensus during its private meetings with Tidewater and Artesian to privatize the Town's wastewater treatment system at the November 13, 2006 special meeting. The Council posted public notice of that special meeting on November 3, 2006, the date of the last private meeting with Artesian. The minutes of that special meeting do not reflect any discussion by the Council of the merits of privatization after the Council voted to amend the agenda to include that issue. The Council simply voted on the issue (unanimously in favor).

We determine that the Town violated the open meeting requirements of FOIA when a constructive quorum of the Town Council met in a series of meetings, first with Tidewater and then with Artesian, to discuss an important matter of public business without notice to the public, without posting an agenda, and without preparing minutes as required by FOIA.

It does not make any difference whether the Council took official action to privatize the Town's wastewater treatment system during those serial meetings. The open meeting requirements of FOIA apply whenever a public body engages in "fact gathering, deliberations and discussions all of which surely affect the public body's final decision." *Levy v. Board of Education of Cape Henlopen School District*, C.A. No. 1447, 1990 WL 154147, at p.6 (Del. Ch.. 1990) (Chandler, V.C.). "[D]ecisions by public entities cannot realistically be understood as isolated instances of collective choice, but are best understood as a decisional process based on inquiry, deliberation and consensus building." *Id.*

B. Confidential Proprietary Information

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The Town contends that FOIA authorized the Council to meet privately with Artesian and Tidewater because their presentations might have disclosed confidential proprietary information.

FOIA exempts from the definition of a public record "[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 *Del. C.* §10002(g)(2). Correspondingly, FOIA authorizes a public body to meet in executive session to discuss "the contents of documents, excluded from the definition of 'public record'" *Id.* 10004(b)(6).

"To fall within this exemption [for trade secrets or confidential commercial or financial information], the government has the burden of showing that disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained." *Att'y Gen. Op.* 03-IB21 (Oct. 6, 2003) (no evidence that disclosure of information in the county's public official insurance policy would cause the insurer competitive harm).

Under FOIA, the burden of proof is on the Town to show that any information provided by Artesian or Tidewater at the private meetings with Council members was exempt under FOIA as trade secrets or confidential commercial or financial information. "[O]nly the public body holding the information can speak confidently regarding the nature of the material, and the circumstances of its preparation and use." *Guy v. Judicial Nominating Commission*, 659 A.2d 777, 781 (Del. Super. 1995) (Ridgely, Pres. J.).

We determine that the Town has failed to meet its burden of proving that, at the private meetings with Artesian and Tidewater, the Town discussed confidential proprietary information exempt from disclosure under FOIA. The Town has only represented that "there were no written

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materials or handouts by either company at the meetings. Each presented Power Point Presentations" about "the professional services they could provide to Council." There is nothing in the record to prove that those power point presentations contained any confidential proprietary information exempt from disclosure under FOIA.

Even if the private meetings with Tidewater and Artesian involved discussion of proprietary information exempt from disclosure under FOIA, FOIA still required the Town to notice those meetings to the public, listing in the agenda an intent to meet in executive session and the specific purpose, and then meet in public to vote to go into executive session.

"If a public body meets to discuss only matters that are authorized for executive session, FOIA still requires that the meeting be noticed to the public. The public have a right to attend the opening of the meeting, to see that the public body follows the required procedures for going into executive session, and to observe the discussion of any public business that follows." *Att'y Gen. Op.* 02-IB17 (Aug. 6, 2002). *See Att'y Gen. Op.* 02-IB33 (Dec. 23, 2002) ("FOIA does not permit a 'stand alone' executive session").

The Town has failed to meet its burden of proof that FOIA authorized it to meet privately to discuss proprietary information exempt from disclosure under FOIA. Even if FOIA authorized the Town to meet in executive session to discuss proprietary information, the Town failed to notice the meeting to the public with the intent to go into executive session and the specific purpose; to vote in public session to go into executive session; and to prepare minutes of those executive sessions as required by FOIA.

C. Adequacy of the November 13, 2006 Special Meeting Agenda

The agenda for the November 13, 2006 special meeting of the Town Council listed as the only item for discussion "Wastewater."

"‘An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.’" *Att’y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

"While the statute requires only a ‘general statement’ of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfied neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that that specific important subject will be treated." *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.5 (Del. Ch., Aug. 29, 1986) (Allen, C.). *See Att’y Gen. Op.* 05-IB05 (Feb. 22, 2005) (listing "Town Solicitor" in the agenda was not "sufficient to inform the public that the Council would consider and vote on firing the Town’s legal counsel"); *Att’y Gen. Op.* 02-IB20 (Aug. 30, 2002) ("Town Charter Changes" listed in the agenda "did not sufficiently alert the public that the Town would consider and vote to restrict voter eligibility").

We do not believe that listing "Wastewater" in the agenda for the Town’s November 13, 2006 special meeting sufficiently alerted the public that the Town Council would consider and vote whether to privatize the Town’s wastewater treatment plant and to decide which of two contractors (Tidewater or Artesian) to engage in contract negotiations.

We determine that the Town violated the open meeting requirements of FOIA by failing to post an adequate agenda for the November 13, 2006 special meeting.

D. Amending the Agenda at the November 13, 2006 Special Meeting

The minutes of the November 13, 2006 special meeting reflect that, after short presentations by Artesian and Tidewater, "Councilman Frey made a motion to amend the agenda, and allow Council to vote on whether we should privatize and choosing a vendor. Councilwoman Betts seconds it. All in favor, 'Aye,' Motion Carried."

The minutes then reflect that "Councilman Dvornick made a motion to go to privatization of the Wastewater utility. Councilman Frey seconds it. All in favor, 'Aye.' Motion Carried. Councilwoman Melson made a motion to enter into negotiations with Tidewater. Councilman Frey seconds it." Two Council members voted against that motion, one abstained, and four (a majority) voted in favor of entering into contract negotiations with Tidewater.

FOIA allows a public body to change an agenda "to include additional items including executive sessions or the deletion of items including executive sessions **which arise at the time of the public body's meeting.**" 29 *Del. C.* §10004(e)(2) (emphasis added).

Our Office has determined that a matter does not "arise" at a public meeting "by way of a motion to add the issue to the agenda. By that circular logic, there would be no limits on what business could be discussed at the meeting of the public body, so long as the agenda provided that it was subject to change. We have previously cautioned that Section 10004(e)(2) of FOIA must be construed narrowly 'lest the exception swallow the rule.'" *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003)

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(quoting *Att'y Gen. Op.* 03-IB18 (July 18, 2003)).

The privatization of the Town's wastewater treatment system was not a matter of public business which came up for the first time during the November 13, 2006 special meeting of the Town Council. The Council had already discussed that issue in six private meetings with the two competing vendors, Artesian and Tidewater, and invited them to make further presentations at the November 13, 2006 special meeting. If "a public body knows that an item of public interest will be addressed at a meeting, then it cannot claim, in good faith, that the issue arose at the time of the public body's meeting in order to circumvent the notice requirements of FOIA." *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997).

We determine that the Town Council violated the open meeting requirements of FOIA when it amended the agenda during the November 13, 2006 special meeting to include matters of public business which the Town knew would be discussed at that meeting.

E. Remediation

The Town contends that it has remediated any violation of the open meeting requirements of FOIA by: (1) noticing a special meeting to the public for November 13, 2006 to discuss the privatization of the Town's wastewater treatment system; and (2) by scheduling another special meeting on December 15, 2006 to ratify the previous votes to privatize and begin contract negotiations with Tidewater.

In *Levy v. Board of Education of Cape Henlopen School District*, the Chancery Court observed: "There may be circumstances where this Court would legitimately conclude that a later

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public vote at a meeting held in compliance with the sunshine law would remedy an earlier minor violation" but not when the later vote is merely 'the pro forma acceptance of an information decision reached during earlier private meetings' after "an ongoing pattern of violations." 1990 WL 154147, at p. 7.

"On several occasions, our Office has concluded that remediation was not necessary because the public body cured a violation of the open meeting law by ratifying the action at a later meeting properly noticed to the public." *Att'y Gen. Op.* 06-ID26 (Dec. 20, 2006) (and citations therein). "By 'ratify,' however, we mean more than cursory approval of prior actions taken in violation of FOIA." *Id.* There must be "new and substantial reconsideration of actions on matters of public business" *Id.*

We do not believe that the November 13, 2006 special meeting cured the Town's prior FOIA violations in meeting privately with Artesian and Tidewater without notice to the public to discuss privatization of the Town's wastewater treatment system. First, the agenda for the November 13, 2006 special meeting was inadequate to alert the public that the Town Council would consider and vote to privatize the facility and enter into contract negotiations with a private contractor. *See Att'y Gen. Op.* 06-ID26 ("the public body cured a violation of the open meeting law at a later meeting **properly noticed to the public**") (emphasis added). Second, the Council again violated the public notice requirements of FOIA when it amended the agenda during the November 13, 2006 special meeting to include privatization of the wastewater treatment system and a vote on which vendor to use. The November 13, 2006 special meeting was not properly noticed to the public so as to cure

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any prior violations of the open meeting law.

We also do not believe that the December 15, 2006 meeting remediated any prior FOIA violations.³ The minutes of that meeting show two cursory resolutions "to explore privatization of Town Wastewater Systems to include operation and/or sale" and "to authorize the Town to engage in contract negotiations for professional services . . . regarding Tidewater to operate the wastewater system for the Town of Milton and to purchase that system from the Town." We do not believe that amounted to new and substantial reconsideration of actions previously taken by the Council in violation of FOIA.

Because of the number and severity of the Town's FOIA violations and the ongoing pattern of violations, we believe that remediation is required.

³ We note that the Town did not notice the December 15, 2006 special meeting to cure prior FOIA violations but rather (as stated in the agenda) to cure a violation of the Town Charter with respect to the procedures followed to call the November 13, 2006 special meeting.

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CONCLUSION

For the foregoing reasons, we determine that the Town Council violated the open meeting requirements of FOIA by: (1) meeting privately six times in October and November 2006 to discuss matters of public business without notice to the public, without posting an agenda, and without preparing minutes; (2) failing to post an adequate agenda for the Town's November 13, 2006 special meeting; and (3) amending the agenda for the November 13, 2006 meeting during the meeting to include matters of public business which arise prior to that meeting.

As remediation, we direct the Town to schedule a meeting within thirty days of the date of this opinion in strict compliance with the public notice and agenda requirements of FOIA for new and substantial reconsideration of the votes taken: (1) to privatize the Town's wastewater treatment system; and (2) to engage in contract negotiations with Tidewater. We direct the Town Solicitor to report back to our Office in writing within ten days after the Town completes remediation.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Joseph R. Biden, III
Attorney General

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